Beh Hai Moy v Kwong Yik Bank Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2(S4)-22-549 OF 1994
KAMALANATHAN RATNAM J
12 MAY 2000

Civil Procedure *— Want of prosecution — Delay — Application to strike out — Pleadings must be closed before delay can be considered — No blame attributed to plaintiff — Whether application should be allowed*

The plaintiff filed an action for defamation against the defendants in the magistrate's court. The second defendant had entered conditional appearance on 9 June 1989 and filed an application on 22 June 1989 (encl 8) to set aside the writ. The first defendant filed its amended defence on 14 February 1992. The file was transferred to the High Court on 14 November 1994. On 18 May 1999, the second defendant withdrew encl 8 and on 15 June 1999 filed the defence. Hence pleadings were deemed closed only on 15 July 1999. Pursuant to the Practice Directions, the file being a matter concerning defamation was transferred to this court on 4 November 1999. The first defendant filed an application to strike out the suit for want of prosecution which was granted by the senior assistant registrar. The plaintiff appealed.

Held, allowing the appeal:

(1) It is imperative that pleadings must be deemed to be closed before delay can be considered. In this case, pleadings were deemed closed only on 15 July 1999. The delay that one can see was definitely not that of the plaintiff. The first defendant could have at least written in asking whether the plaintiff would elect to proceed at least against the first defendant. This was never done. So far as the plaintiff was concerned, she intended no doubt to proceed against both the defendants in this same suit (see pp 478H, 479E–F).

(2) The second defendant had filed encl 8 on 22 June 1989. This was only disposed of 10 years later on 18 May 1999. Surely no blame could be attributed to the plaintiff. On this ground alone, it was sufficient for the court to set aside the order of the senior assistant registrar and to allow the appeal (see p 479G–H).

[Bahasa Malaysia summary

Plaintif telah memfailkan suatu tindakan untuk fitnah terhadap defendan-defendan di mahkamah majistret. Defendan kedua telah memasukkan kehadiran bersyarat pada 9 Jun 1989 dan memfailkan satu permohonan pada 22 Jun 1989 (lampiran 8) untuk mengetepikan writ. Defendan pertama memfailkan pembelaannya yang terpinda pada 14 Februari 1992. Fail tersebut dipindah ke Mahkamah Tinggi pada 14 November 1994. Pada 18 Mei 1999, defendan kedua menarik balik lampiran 8 dan pada 15 Jun 1999 memfailkan

A pembelaan. Justeru itu, pliding hanya dianggap tutup pada 15 Julai 1999. Menurut Arahan Amalan, memandangkan fail tersebut adalah berkaitan dengan fitnah ia telah dipindahkan ke mahkamah ini pada 4 November 1999. Defendan pertama memfailkan satu permohonan untuk membatalkan guaman itu berlandaskan ketiadaan pendakwaan yang dibenarkan oleh penolong kanan pendaftar. Plaintif membuat B rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Adalah wajib untuk pliding dianggap tutup sebelum kelewatan C boleh dipertimbangkan. Dalam kes ini, pliding hanya dianggap tutup hanya pada 15 Julai 1999. Kelewatan yang dilihat di sini bukanlah kesalahan plaintif. Defendan pertama sepatutnya menulis untuk bertanyakan sama ada plaintif akan memili untuk meneruskan sekurang-kurangnya terhadap defendan pertama. Ini tidak dilakukan. Sejauh mana ia berkaitan dengan plaintif, sudah D pasti beliau berhasrat meneruskan tindakan terhadap kedua-dua defendan dalam guaman yang sama (lihat ms 478H, 479E–F).

(2) Defendan kedua telah memfailkan lampiran 8 pada 22 Jun 1989. Ini hanya diselesaikan 10 tahun kemudian pada 18 Mei 1999. Sudah tentu plaintif tidak boleh dipersalahkan. Atas alasan ini sahaja adalah mencukupi untuk mahkamah mengetepikan E perintah penolong kanan pendaftar dan untuk membenarkan rayuan (lihat ms 479G–H).]

Notes

For cases on want of prosecution, see 2(2) *Mallal's Digest* (4th Ed, F 1998 Reissue) paras 4974–5015.

Cases referred to

TM Feroze Khan & Ors v Meera Hussain TM Mohamed Mydin [1999] 4 CLJ 373 (folld)

G *P Jeyakumar* (*Zahir Jeya & Zaina*) for the plaintiff/appellant.
Shamsiah Hj Muda (*J Kannaperan* with her) (*Shearn Delamore & Co*) for the first defendant/respondent.

Kamalanathan Ratnam J:

H *The application*

The first defendant filed an application to strike out the suit for want of prosecution with costs. The learned senior assistant registrar ('the SAR') who heard the application granted the order prayed for on 26 November 1999. The plaintiff therefore appealed against that decision before me.

I *Facts*

This is an action for defamation filed by the plaintiff for publishing and/or causing the publication of a notice in *The Malay Mail*, a daily newspaper

publication. The first defendant is a bank. The second defendant, a firm of solicitors, acted for the first defendant in respect of Kuala Lumpur Summons No 62–2241–87 in the magistrate's court ('the summons'). The plaintiff has not at any material time been a customer of the first defendant, nor has she borrowed any monies from the first defendant. The second defendant on the instructions and/or with the consent of the first defendant, published in *The Malay Mail* a notice of the summons, indicating that service by way of substituted service was being proceeded with, by the first defendant against the plaintiff and one Beh Sam Cheng @ Beh Siam Cheng ('the other Beh') claiming in the said summons that the plaintiff herein and the other Beh were indebted to the bank in the sum of RM10,464.41 together with interest. The plaintiff now claims she has been defamed because she has been accused of being a debtor and as one who was avoiding service, so much so that there was a need to go by way of substituted service. I do not intend to go into further details of the case to deal with the present appeal.

Chronology of events

The plaintiff tendered a chronology of events which the first defendant accepted as correct. The second defendant is not involved in respect of this appeal.

Findings of the court

The Federal Court in *TM Feroze Khan & Ors v Meera Hussain TM Mohamed Mydin* [1999] 4 CLJ 373 (FC) laid down the latest ruling on matters of this kind. The highest court of the land held that the power to dismiss an action for want of prosecution should be exercised only where: (1) the default has been intentional and contumelious; or (2)(a) there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and (b) such delay will give rise to a substantial risk to a fair trial of the issues in the action or is likely to cause serious prejudice to the defendants. The court further held that in the event there is no inordinate and inexcusable delay, the question of substantial risk for a fair trial or prejudice does not arise.

Is there a delay in this case?

It is easy merely by considering the fact that the action was filed on 28 April 1989 to conclude that there has been an 11 years' delay. But the question of delay must necessarily be considered within the Rules of the High Court 1980 ('the RHC'). Order 25 r 1(1) of the RHC provides that the plaintiff must within one month after the pleadings in the action are deemed to be closed, take out a summons in Form 46 ('the summons for directions') returnable in not less than 14 days. It is therefore imperative that pleadings must be deemed to be closed before delay can be considered. In this case, whilst the first defendant filed its amended defence on 14 February 1992, the second defendant did not file its defence until 15 June 1999. The chronology of events as agreed to by both parties failed to mention a very

A relevant and pertinent fact for the court's consideration. The second defendant had entered conditional appearance on 9 June 1989 and within the required 14 days filed an application ('encl 8') on 22 June 1989 to set aside the writ and there was also included in the said application a prayer to transfer the case to the High Court at Kuala Lumpur. Finally the file found its way to the Kuala Lumpur High Court on 14 November 1994 since the B learned judge in Penang where it was initially filed only made an order in respect of the transfer of the case to the High Court at Kuala Lumpur. It must be noted that by now five years had gone by. After about six months the second defendant wrote to the registry at Kuala Lumpur for a hearing date for encl 8. There was no response from the registry until 29 July 1998 C when the learned judge issued a show cause notice. However, when the matter came up before the learned judge on 21 August 1998 on the show cause notice, there were no documents in the court file. The learned judge then advised parties to assist in the re-construction of the file.

Pursuant to the Practice Directions this file being a matter concerning D defamation was transferred to this court on 4 November 1999. The learned SAR then heard the first defendant's application to strike out and gave her decision on 26 November 1999. On 14 December 1999, when I had the first case management for this case all parties were represented and asked for another date pending the hearing to this appeal. I then heard the appeal and allowed the appeal on 21 February 2000. In the meantime, the second E defendant had withdrawn his encl 8 on 18 May 1999 and on 3 June 1999 filed the memorandum of appearance and filed the defence on 15 June 1999. Hence pleadings were deemed closed only on 15 July 1999.

The delay that one can see is definitely not that of the plaintiff. Surely the first defendant could have at least written in asking whether the plaintiff F would elect to proceed at least against the first defendant. This was never done. So far as the plaintiff was concerned, she intended no doubt to proceed against both the defendants in this same suit. In fact in *TM Feroze Khan*, the Federal Court held that when the application to intervene was filed on 13 March 1993 but was only disposed of by the court on 30 September 1995, clearly since the matter was essentially in the hands of G the court or the registry, no blame could be attributed to the plaintiffs for the delay.

Similarly in this case, the second defendant had filed encl 8 on 22 June 1989. This was only disposed of on 18 May 1999 exactly ten years later. Surely no blame could be attributed to the plaintiff. On this ground alone it H was sufficient for me to have set aside the order of the learned SAR and to allow the appeal. However, in the exercise of my discretion, I directed that both the costs here and below, be costs in the cause since neither party is to be blamed for the delay. I then proceeded with the next stage of case management.

I *Appeal allowed.*

Reported by Jafisah Jaafar